No. 09-72387

UNITED STATES COURT of APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

and

CARPENTERS' UNION LOCAL 180, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Intervenor

v.

HEARN CONSTRUCTION

Respondent

ON APPLICATION FOR ENFORCEMENT AND CROSS-PETITION FOR REVIEW OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The National Labor Relations Board ("the Board") had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations

Act, as amended,¹ which authorizes the Board to prevent unfair labor practices affecting commerce. The Board issued its Decision and Order, reported at 354 NLRB No. 37, on June 30, 2009.²

The Board's Order is final with respect to all parties under Section 10(e) and (f) of the Act.³ The Board's Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act.⁴ The Seventh, First, Second, and Fourth Circuits have upheld the issuance of decisions by the same two-member quorum.⁵ The D.C. Circuit has issued the only contrary

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¹ 29 U.S.C. §§ 151, 160(a).

² ER 14. "ER" references are to Hearn Construction's Excerpts of Record. "SER" references are to the Board's Supplemental Excerpts of Record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Co. Br." references are to the Company's opening brief.

³ 29 U.S.C. § 160(e) and (f).

⁴ 29 U.S.C. § 153(b). See ER 14 n.1.

⁵ New Process Steel, L.P. v. NLRB, 564 F.3d 840 (7th Cir. 2009), cert. granted, __ S.Ct. __, 2009 WL 1468482 (U.S. Nov. 2, 2009); Northeastern Land Servs. v. NLRB, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213); Snell Island SNF LLC v. NLRB, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); Narricot Indus., L.P. v. NLRB, __ F.3d __, 2009 WL 4016113 (4th Cir. Nov. 20, 2009).

decision.⁶ The issue has been briefed to this Court in *NLRB v. UFCW Local 4*, No. 09-70922, and *NLRB v. Barstow Community Hospital*, No. 09-70771.

This case is before the Court on the Board's application for enforcement of its Order, and the cross-petition for review filed by Hearn Construction ("the Company"). The application and cross-petition were timely, as the Act imposes no time limitation on such filings. This Court has jurisdiction under Section 10(e) and (f) of the Act because the unfair labor practice took place in Fairfield, California. The Company was the Respondent before the Board. Carpenters' Union Local 180, United Brotherhood of Carpenters and Joiners of America ("the Union"), was the Charging Party before the Board and has intervened on the side of the Board.

STATEMENT OF THE ISSUE PRESENTED

An employer violates Section 8(a)(1) of the Act by causing the arrest of employees engaged in protected activity on public property. The Company executed a citizen's arrest of two peaceful area standards picketers for trespassing even though the Company admits they were on the public right of way at the gate designated by the Company for such activity. Does substantial evidence support

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⁶ Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

the Board's finding that the Company violated Section 8(a)(1) of the Act by causing the arrest of these picketers?

STATEMENT OF THE CASE

Based on a charge filed by the Union, the Board's General Counsel issued an unfair labor practice complaint alleging that the Company violated Section 8(a)(1) of the Act⁷ by seeking the removal of, threatening to cause the arrest of, and causing the arrest of two union demonstrators who were engaged in lawful picketing on the public right of way.

Following a hearing, an administrative law judge issued a decision finding merit to the allegation that the Company violated the Act by causing the arrest of the demonstrators who were engaged in lawful area standards picketing in a designated area on the public right of way. The judge dismissed the allegation that the Company threatened to arrest the demonstrators, and she did not pass on the allegation that the Company committed a separate 8(a)(1) violation by seeking to remove the demonstrators from the public right of way. The parties filed exceptions and briefs in support of exceptions. On June 30, 2009, the Board issued its Decision upholding the judge's findings and recommended Order.

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⁷ 29 U.S.C. § 158(a)(1).

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Company was hired to construct a building at a jobsite located on private property in Fairfield, California

In January 2007, the Company entered into contracts with NorthBay
Healthcare and NexCore Partners to construct an office building in Fairfield,
California. The construction occurred at the southwest corner of Mangels
Boulevard and Business Center Drive.⁸ Business Center Drive runs north-south
along the eastern border of the property. Mangels Boulevard curves around the
northern and western borders of the property. To the south is a privately-owned
vacant lot, and the Company had an easement giving it permission to operate on
the vacant lot.⁹

The jobsite on which the building was to be constructed is privately owned by Northbay Healthcare Group. However, a strip of land between the jobsite and Mangels Boulevard is owned by the City of Fairfield and constitutes a public right

⁸ ER 15; SER 63.

⁹ ER 15: SER 24.

of way.¹⁰ The public right of way extends 25 feet from the curb of Mangels Boulevard to the property line of the privately-owned jobsite.¹¹

B. The City issued the Company an encroachment permit to perform limited work on the public right of way abutting the jobsite; the permit did not limit the lawful uses of the public right of way

In order to connect the new building to facilities owned by the City, such as sewers and streets, the Company needed to do some construction work in the public right of way. ¹² In February 2007, the Company applied for and obtained a 4-month encroachment permit from the City to allow it to do this work and also to install a sidewalk on the public right of way along Mangels Boulevard. ¹³ The City granted the encroachment permit "subject to the right of the city, and any person entitled thereto, to use any part of a public right of way for any purpose for which it may be lawfully used." ¹⁴

Construction began in May 2007. When the events at issue took place, the Company had not yet begun any work in the public right of way along Mangels

¹⁰ ER 15; SER 7, 9, 11, ER 254(a) & (b).

¹¹ ER 15; SER 11.

¹² ER 15; SER 7-8.

¹³ ER 15; ER 254(a) & (b).

¹⁴ ER 15 n.6; SER 65.

Boulevard.¹⁵ The Company erected a construction fence along the curbs of Mangels Boulevard and Business Center Drive. The public right of way was inside the fence.¹⁶ The fence originally had one gate cut into it, though later several other gates were added.

C. The Union protested on the public right of way abutting the jobsite to publicize a nonunion subcontractor's payment of wages below area standards; the encroachment permit expired

James Clarke was the Company's project manager. Most of the employees working at the jobsite on Mangels Boulevard worked for subcontractors rather than directly for the Company. The Company hired Sommerkal Construction, Inc., to perform concrete work for the project.¹⁷

Michael Johnson worked for the Union as a field representative. In May 2007, he visited the jobsite and spoke with a Sommerkal employee. The employee showed Johnson a pay stub indicating that Sommerkal paid him about \$20 per hour with no benefits. Johnson testified that workers in the area typically receive wages and benefits worth \$50 per hour. The Union subsequently sent a letter to

¹⁵ ER 349.

¹⁶ ER 15: ER 275, 314.

¹⁷ ER 15: ER 267-272.

¹⁸ ER 15: SER 27.

Sommerkal in an attempt to confirm the information obtained from the Sommerkal employee; Sommerkal did not respond.¹⁹

The Company's encroachment permit to perform work on the public right of way expired on June 15, 2007.²⁰

To publicize Sommerkal's failure to pay wages and benefits in conformance with area standards, the Union decided to picket. On June 29, 2007, Johnson and several other picketers went to the only gate in the fence around the public right of way with picket signs explaining their concern. They confirmed that Sommerkal employees were working and then began picketing on the public right of way, just inside the open gate.²¹ The picketers walked back and forth at the gate, just inside the curb, on the public right of way. They never blocked traffic; when a vehicle needed to enter the property, the picketers moved out of the way.²² They picketed until 12 p.m. or 1 p.m.

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¹⁹ ER 15; SER 28-29.

²⁰ ER 17; SER 3, 5, 6, 9.

²¹ ER 15; SER 29-32.

²² ER 15-16; ER 313, SER 32-36, 48.

D. The Company created several other gates in the fence and designated the public right of way at Gate 1 as the location for the Union to picket Sommerkal

When the picketers arrived the following day, the Company had added a second gate to the fence around the public right of way on Mangels Boulevard and set up a reserved gate system. A reserved gate system is often used at jobsites involving many employers and is intended to isolate the employer with whom a union has a primary dispute, permitting other neutral employers to continue operating without having to cross a picket line. The Company posted signs indicating which gate each employer should use. The Company labeled Gate 1 for use by Sommerkal, while Gate 2 was intended to be used by union contractors only.²³ The Company also sent a letter to the Union describing the reserved gate system and its expectations that the gate system be respected.²⁴

Over the next 3 weeks, the Union continued picketing on the public right of way at Gate 1 between 3 and 5 days per week, generally from 7 a.m. to 1 or 2 p.m., with between 4 and 8 picketers.²⁵ They sometimes used a bullhorn so the workers could hear them over the loud sound of construction equipment, but they never

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²³ ER 16; SER 31, ER 255-257.

²⁴ ER 16; SER 31, 37, ER 255-257.

²⁵ ER 16: SER 33.

used profanity.²⁶ While at Gate 1, the picketers stayed within the public right of way, never going more than ten or twelve feet from the curb on Mangels Boulevard.²⁷

On July 5, Sommerkal failed to use the gate that the Company had designated for it. Instead, Sommerkal used Gate 3, located on the south side of the jobsite where it borders a privately-owned vacant lot.²⁸ The Union briefly picketed at that tainted gate until Sommerkal stopped using it. After this, the Company reestablished the reserved gate system and sent another letter to the Union explaining who was supposed to use each gate.²⁹ During these 3 weeks, the Company never objected to the Union's picketing on the public right of way at Gate 1, or on private property at Gate 3 when Sommerkal failed to comply with the reserved gate system.

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²⁶ SER 52.

²⁷ ER 16-17; SER 1, 11, 13, 36.

²⁸ ER 16: SER 39-40.

²⁹ ER 16; ER 255-257.

Sommerkal used gates other than Gate 1, and the Union briefly picketed E. those tainted gates before returning to Gate 1

On July 18, 2007, union picketers arrived at the jobsite around 7 a.m. After confirming that Sommerkal employees were onsite, the Union began picketing on the public right of way at Gate 1.30 The bullhorn broke early that morning, so they were unable to use it.³¹ At approximately 10 a.m., Sommerkal employees began unloading lumber from a truck at Gate 3, on the south side of the jobsite. Johnson sent picketer Trent Schager and another picketer to Gate 3, where they picketed until Sommerkal stopped using that gate.³² At 11 a.m., Sommerkal employees began unloading another truck at Gate 4, also on the south side of the jobsite. Johnson sent Schager and another picketer to Gate 4, where they picketed for about an hour.³³ At all times, Union Representative Johnson remained on the public right of way at Gate 1.³⁴ Gates 3 and 4 are located where the jobsite borders a privatelyowned vacant lot, through which the Company had an easement.³⁵

³⁰ ER 16; SER 42.

³¹ ER 16: SER 43.

³² ER 16; ER 280-286, SER 14-16, 43.

³³ ER 16: SER 17-18, 44.

³⁴ ER 17; SER 18, 46.

³⁵ ER 16: ER 350-351.

Ted Maestes, a representative of NexCore Management, Inc., which is a general partner of NorthBay Headquarters, LP, was present at the jobsite on July 18, 2007. When Maestes saw the picketers at Gates 3 and 4, he asked Project Manager Clarke why the picketers were not at Gate 1. Clarke told Maestes that the picketers would return to Gate 1 as soon as Sommerkal stopped working at the other gates.³⁶

F. Maestes called the police

Maestes and Clarke went to Gate 1 to speak with Johnson. Maestes asked Johnson to have the picketers at Gate 4 return to Gate 1. Johnson refused, stating the Union had the right to picket wherever Sommerkal worked. Maestes then called the police and reported that the picketers were trespassing on private property at Gates 3 and 4.³⁷ When two police officers arrived around 12 p.m., there were still two picketers at Gate 4. Clarke and Johnson explained the reserved gate system to the police. Project Manager Clarke told the officers that the Union had the right to picket at Gate 1.³⁸ The police asked Johnson to move the picketers

³⁶ ER 16; ER 290-294.

³⁷ ER 16: ER 297-298.

³⁸ ER 16: ER 300.

from Gates 3 and 4 back to Gate 1.³⁹ Johnson eventually relented, and the picketing continued on the public right of way at Gate 1.⁴⁰ Maestes and Clarke went back to work, but the police remained onsite to monitor the picketing.

G. Clarke signed a citizen's arrest form declaring that the picketers were trespassing on private property; the two picketers were arrested

About 30 minutes later, the police officers asked Union Representative

Johnson to move the picketing from the public right of way at Gate 1 to the corner
of Mangels Boulevard and Business Center Drive for safety reasons. Johnson
informed the officers that he could not do that because the reserved gate system set
up by the Company required the Union to picket at the designated gate to minimize
the impact of the picketing on neutral employers. He feared that picketing
anywhere other than the designated location could be construed as a secondary
boycott in violation of the National Labor Relations Act.⁴¹ The officer threatened
to arrest the picketers if they did not relocate to the corner, so Johnson sent most of

³⁹ ER 16: ER 300. SER 49-50.

⁴⁰ ER 16; ER 304.

⁴¹ ER 16: SER 50.

the picketers home. Johnson remained with Schager in the public right of way at Gate 1.42

Project Manager Clarke approached one of the officers, and they discussed the two picketers who remained at Gate 1.⁴³ Clarke told the officer, "I don't want them on my dirt."⁴⁴ The officer stated that the only way Clarke could physically remove the picketers was by signing a citizen's arrest form. Clarke signed two citizen's arrest forms declaring "under penalty of perjury" that both Johnson and Schager had trespassed on private property.⁴⁵ The citizen's arrest form issued to Johnson also alleged that he illegally used a bullhorn.⁴⁶

Johnson and Schager were arrested, handcuffed, and put into the back of a squad car as the employees working at the jobsite watched.⁴⁷ Johnson and Schager sat in the back of the squad car for 20 minutes while the Company filled out the paperwork. The police took Johnson and Schager to the police department, where

⁴² ER 16; SER 50-51.

⁴³ ER 16; ER 304.

⁴⁴ ER 16; ER 346-347.

⁴⁵ ER 16; SER 61, ER 304.

⁴⁶ ER 16; SER 61-62.

⁴⁷ ER 16: SER 53.

they sat in a small interrogation room for about an hour before being cited and released.⁴⁸

The next day, Johnson went to the City of Fairfield Department of Public Works. He looked at the property records and verified that the property on which they were picketing at Gate 1 is a public right of way. He also noticed that the Company's encroachment permit had expired on June 15, 2007, over a month before the arrests and before the picketing even started. Johnson notified the Director of Public Works that the permit had expired, and at some point later the permit was extended to June 15, 2008.⁴⁹ The City decided not to prosecute Johnson and Schager.⁵⁰

II. THE BOARD'S CONCLUSIONS AND ORDER

In agreement with the administrative law judge, the Board (Chairman Liebman and Member Schaumber) found that the Company violated Section 8(a)(1) of the Act⁵¹ by causing the arrest of individuals engaged in protected area standards picketing on the public right of way. The Board's Order directs the

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⁴⁸ ER 16; SER 53.

⁴⁹ ER 17; SER 3-4, 56-57.

⁵⁰ ER 17; SER 54.

⁵¹ 29 U.S.C. § 158(a)(1).

Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. Affirmatively, the Board's Order directs the Company to petition the appropriate police department or court to request that any record of the arrests be expunged; to reimburse the Union for the legal fees and expenses incurred in defending Johnson and Schager against the criminal complaints filed by the Company; and to post copies of a remedial notice.

STANDARD OF REVIEW

As the Supreme Court has recognized, it is the special function of the Board to apply "the general provisions of the Act to the complexities of industrial life." Accordingly, this Court has acknowledged that the Board's decisions are entitled to deferential review. On all issues of fact, the Board's findings are conclusive if supported by substantial evidence. Furthermore, this Court will defer to the Board's interpretations of the Act so long as they are "rational and"

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⁵² Ford Motor Co. v. NLRB, 441 U.S. 488, 496 (1979) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963)).

⁵³ NLRB v. Calkins, 187 F.3d 1080, 1085 (9th Cir. 1999).

⁵⁴ *Id.*; 29 U.S.C. § 160(e).

consistent" with the statutory language. 55 *De novo* review applies only to legal conclusions that are "outside the [Board's] 'special expertise." 56

SUMMARY OF ARGUMENT

This is a simple case. The Company executed a citizen's arrest of two peaceful union area standards picketers who were protesting on a public right of way. The Company instigated the arrest by signing citizen's arrest forms declaring that the picketers were trespassing on private property. The evidence clearly shows, however, and the Company now admits, that "the picketers were standing on the public right of way." Because there is no dispute that the protesters were on public property and were engaged in protected concerted activity, the Board reasonably concluded that the Company violated the Act by causing their arrest.

The Company had no right to exclude demonstrators from the public right of way on which they were picketing. Indeed, the Company had designated the public right of way at Gate 1 as the appropriate location for the Union to picket.

Yet the Company caused the police to arrest the picketers for trespassing.

⁵⁵ Calkins, 187 F.3d at 1085.

⁵⁶ NLRB v. Int'l Bhd. Of Elec. Workers, Local 48, 345 F.3d 1049, 1054 (9th Cir. 2003) (quoting American Pac. Concrete Pipe Co. v. NLRB, 788 F.2d 586, 590 (9th Cir. 1986)).

⁵⁷ Co. Br. 27.

Contrary to the Company's contention, it had no excuse legally justifying its behavior. It had no property interest in the public right of way, nor did the Company present any evidence at trial that its actions were motivated by legitimate safety concerns. The Board had ample grounds for rejecting the Company's arguments.

Finally, the Board is aware of no case indicating the First Amendment right to petition the government includes a right to execute a citizen's arrest of persons engaged in lawful activity on public property. The Board's determination that the Company violated the Act by causing the arrest of picketers who were engaged in protected activity on public property is reasonable and fully supported by the evidence.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY CAUSING THE ARREST OF AREA STANDARDS PICKETERS FOR TRESPASS, EVEN THOUGH THEY WERE DEMONSTRATING ON THE PUBLIC RIGHT OF WAY

A. The Act prohibits an employer from engaging in conduct that has a reasonable tendency to coerce employees in the exercise of their statutory rights

Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The guarantees of Section 7 are protected by Section 8(a)(1) of the Act, which provides that "[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise" of those rights. ⁵⁹ Therefore, as this Court has recognized, an employer violates Section 8(a)(1) when its conduct tends

⁵⁸ 29 U.S.C. § 157.

⁵⁹ 29 U.S.C. § 158(a)(1).

to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.⁶⁰

The central question in the Board's assessment of whether an employer's conduct violates Section 8(a)(1) of the Act is not whether an employee was in fact intimidated or coerced, but "whether, under all the circumstances, the [conduct] reasonably tends to restrain or interfere with the employees in the exercise of the protected rights." No proof of coercive intent is necessary to establish a violation of Section 8(a)(1).⁶²

As this Court has recognized, area standards picketing – in which, for example, employees of a unionized employer and nonemployee union representatives picket other, non-unionized employers who undercut the labor market by paying below prevailing area standards – is protected Section 7

⁶⁰ Retlaw Broadcasting Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995); NLRB v. Bighorn Beverage, 614 F.2d 1238, 1241 (9th Cir. 1980) (quoting Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1080 (9th Cir. 1977)). See California Acrylic Indus., Inc. v. NLRB, 150 F.3d 1095, 1099 (9th Cir. 1998) (employer "activity that tends to chill an employee's freedom to exercise his section 7 rights" violates Section 8(a)(1)).

⁶¹ Bighorn Beverage, 614 F.2d at 1241 (quoting Penasquitos Village, Inc., 565 F.2d at 1080).

⁶² See Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 725 (9th Cir. 1980) (stating test for 8(a)(1) violation is whether conduct "reasonably tends to restrain or interfere with" protected activity).

activity.⁶³ And there can be no doubt that causing the arrest of employees engaged in area standards picketing tends to interfere with, restrain, and coerce the arrested employees and all others who see or hear about the arrests.⁶⁴ Because the Company caused the arrest of two area standards picketers for trespassing – despite the fact that they were picketing on the public right of way and in the exact location designated by the Company – the Board reasonably found that the Company violated Section 8(a)(1).

B. The Board reasonably concluded that the Company coercively interfered with the exercise of statutory rights when it caused the arrest for trespass of area standards picketers who were peacefully protesting on the public right of way

Because the controlling legal principles have been settled for decades, the issue presented here is simply whether the record evidence supports the Board's findings. The two most important facts supporting the Board's conclusion are (1) that the Union was engaged in peaceful area standards picketing on the public right of way, and (2) that the Company told the Union to picket in that location. These incontrovertible facts compel the conclusion that the Union's picketing was

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⁶³ *NLRB v. Calkins*, 187 F.3d 1080, 1086 (9th Cir. 1999) ("Protected Section 7 conduct . . . has come to include the right to conduct area standards picketing.").

⁶⁴ NLRB v. Springfield Hosp., 899 F.2d 1305, 1312 (2d Cir. 1990).

protected by Section 7 of the Act, and that the Company therefore violated the Act by having the picketers arrested for trespassing.

The evidence overwhelmingly establishes that the picketers were on the public right of way at the time they were arrested for trespassing. Gene Cortright, the Director of Public Works for the City of Fairfield, testified that the public right of way extends 25 feet from the curb at Gate 1.65 Two of the people who participated in the picketing, Steve Bell and Michael Johnson, testified that they never went more than 15 feet from the curb at Gate 1.66 The Company's only witness, James Clarke, did not contradict this testimony, and he admitted that the picketers were at Gate 1 when the arrests took place.67 Indeed, the Company admits in its brief that "the picketers were standing in the public right of way, within the initial 25 feet of the construction project," when they were arrested.68

Even though the picketers were on the public right of way, Clarke signed two citizen's arrest forms declaring that the picketers were trespassing on private

⁶⁵ SER 11.

⁶⁶ SER 12-13, 36.

⁶⁷ ER 311.

⁶⁸ Co. Br. 27.

property. ⁶⁹ For over 40 years, the Board has held, with court approval, that an employer violates Section 8(a)(1) when it causes the arrest (or threatens to cause the arrest) of employees who are engaged in protected activity on public property or a public right of way. ⁷⁰ For example, in *Roger Hughes*, the Board found that an employer violated Section 8(a)(1) by instigating a citizen's arrest of an area standards picketer who was protesting on public property, falsely accusing the picketer of public urination. ⁷¹ The Board in *Roger Hughes* stated that it "is beyond question" that an employer violates Section 8(a)(1) by excluding employees engaged in protected activity from public property. ⁷² In both *Roger Hughes* and here, the Board reasonably found that causing the arrest of area standards picketers on public property constitutes unlawful interference with their statutory rights.

⁶⁹ SER 61.

⁷⁰ In re Corporate Interiors, Inc., 340 NLRB 732, 741-42, 745-46 (2003) (employer violated 8(a)(1) by causing arrest of area standards picketer on public easement); Cumberland Farms, Inc., 307 NLRB 1479, 1479 n.2 (1992) (employer violated 8(a)(1) by threatening to cause arrest of union member distributing literature on public property), enf'd 984 F.2d 556, 559 (1st Cir. 1993); Clear Lake Hosp., 223 NLRB 1, 6-7 (1976) (employer violated 8(a)(1) by causing arrest of union representatives distributing literature on public property); Monogram Models, Inc., 170 NLRB 636 (1968) (employer violated 8(a)(1) by threatening to cause arrest of union members distributing literature on public property), enf'd 420 F.2d 1263 (7th Cir. 1970).

⁷¹ Roger Hughes, 344 NLRB 413, 414-15 (2005).

To add insult to injury, the Company had the picketers arrested even though they were located exactly where the Company had repeatedly told them to picket. The Company set up the reserved gate system specifically to limit the Union's activity to Gate 1, the gate designated for use by Sommerkal. There is no evidence that the Company had any concern about the safety of picketing in this location.. The Company sent the Union at least three letters explaining the reserved gate system, one of which is dated July 18, 2007, the very day of the arrests. And earlier that day, Clarke had asked the picketers to confine their activity to Gate 1. Indeed, when the police arrived, Clarke told them that the Union was allowed to picket at Gate 1. Even though the picketers were doing exactly what the Company had asked them to do, the Company executed a citizen's arrest.

Given that the area standards picketers were peacefully protesting on the public right of way, in the specific location designated by the Company for such picketing, the Board reasonably concluded that they were engaged in activity

⁷² *Roger Hughes*, 344 NLRB at 414-15.

⁷³ ER 18.

⁷⁴ ER 255-257.

⁷⁵ ER 295, 297.

⁷⁶ ER 300.

protected by Section 7. And because the picketers were engaged in protected activity, the Company violated Section 8(a)(1) when it caused the arrest of two of the picketers. Unequivocal caselaw compels the conclusion that causing the arrest of the picketers tended to restrain or interfere with their protected activity.⁷⁷ Indeed, the Company does not even try to argue otherwise. Arresting lawful picketers is blatantly coercive, and the Company's legally unjustified acts of interference were properly found by the Board to violate Section 8(a)(1).

C. The Company's arguments have no merit because they are based on misstatements of fact and irrelevant caselaw

The Company's brief misstates a number of facts, only two of which deserve a response. First, the Company claims it had some sort of property interest giving it the right to exclude the picketers from the public right of way. As already demonstrated, this is not true. Second, the Company claims Clarke signed the citizen's arrest forms for safety reasons only at the behest of the police. However, the citizen's arrest forms do not accuse the picketers of engaging in unsafe behavior; they accuse the picketers of trespassing on private property. Because the Company's legal arguments have no correlation to the facts, the Court should reject them.

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⁷⁷ Springfield Hosp., 899 F.2d at 1312 (enforcing Board's finding that "arrests interfered with employees' exercise of their right to engage in union activity").

1. The Company had absolutely no property interest in the location of the protest when it had the picketers arrested for trespassing on private property

As set out above, there is no doubt that the picketers were on the public right of way when Clarke signed the citizen's arrest forms. The Company admits this fact. Yet it curiously argues that it had a property interest justifying its behavior. This argument seems to rely exclusively on an encroachment permit that expired a month before the arrests occurred, which could not possibly give the Company the right to exclude the protesters from public property. Indeed, even if the permit had been valid, it was subject to the right of any person entitled to use the public right of way for any lawful purpose. The Company points to nothing else giving it a property interest in the public right of way.

Even more baffling is the Company's citation⁸¹ to a number of freedom-of-speech cases discussing a government entity's right to restrict access to government property. These cases are irrelevant. The Company is not a

⁷⁸ Co. Br. 27.

⁷⁹ Co. Br. 15-21.

⁸⁰ ER 15 n.6.

⁸¹ Co. Br. 15-18.

government entity, and it did not have the right to exclude the picketers from the public right of way. The Board properly rejected this patently absurd argument.⁸²

2. There is no evidence in the record that the Company had the picketers arrested due to safety concerns

Throughout its brief,⁸³ the Company claims it effected the citizen's arrest because of its heartfelt concern for the safety of the picketers. There is no evidence to support this claim.

The citizen's arrest forms that Clarke signed fail to mention safety at all.⁸⁴ Rather, they indicate that the Company had the picketers arrested for trespassing on private property. Nor did Clarke ever suggest that he was concerned about safety. In fact, he testified that he did not care if the picketers were at Gate 1⁸⁵ and claimed that he signed the citizen's arrest forms because the picketers were being disrespectful to the police.⁸⁶ The Company's arguments that it acted for safety reasons are flatly inconsistent with the documentary evidence and the testimony of its sole witness.

⁸³ Co. Br. 8-9, 20-27.

⁸² ER 17.

⁸⁴ SER 61.

⁸⁵ ER 306.

⁸⁶ ER 306, 310.

The police may have been concerned about safety, but the police did not initiate the arrests – the Company did. It is the Company's actions that are at issue. There is no evidence that the Company had any concerns about the safety of picketing at Gate 1, where it told the Union to picket.

Likewise, the Company's assertion⁸⁷ that there was a "misunderstanding" about the police's jurisdiction over the property utterly misdirects the analysis of the statutory violation found. Substantial evidence shows that the officers told Clarke that the only way to remove the picketers was by signing a citizen's arrest form. ⁸⁸ Clarke signed the form, inaccurately stating that Johnson and Shrager were trespassing on private property, when they were in fact on public property at reserved Gate 1 designated for area standards picketing. As the Board found, "by causing the arrest of Union representatives who were engaged in lawful [Section] 7 activity on public property" the Company violated Section 8(a)(1) of the Act. ⁸⁹

⁸⁷ Co. Br. 26.

⁸⁸ ER 16; SER 61, ER 304.

⁸⁹ ER 14 n.3.

D. Neither the Board nor any court has ever held that the right to petition privileges a citizen's arrest of persons engaged in lawful activity on public property

In *BE & K Construction Co. v. NLRB*, ⁹⁰ the Supreme Court held that the Board cannot find an unfair labor practice when an employer sues a union over protected activity, unless that lawsuit is shown to be both objectively baseless and unlawfully motivated. The Court concluded that this limitation on the Act is required to protect genuine efforts to petition the government, which are protected by the First Amendment. The Company attempts⁹¹ to stretch and twist the logic of *BE & K* to protect the declaration it made to the police – that the two picketers were trespassing on private property – in support of its citizen's arrest. The Board is aware of no case even remotely suggesting that such unquestionably inaccurate declarations are privileged by the First Amendment's right to petition. ⁹² The Board therefore found no need to address this issue.

⁹⁰ 536 U.S. 516 (2002).

⁹¹ Co. Br. 22-29.

⁹² See, for example, Whelan v. Abdell, 48 F.3d 1247, 1255 (D.C. Cir. 1995) (rejecting First Amendment defense where statements in petitions were untrue); *Kesmodel v. Rand*, 119 Cal. App. 4th 1128 (2004) (distinguishing California citizen's arrest from petitioning).

CONCLUSION

Because the Board's decision is supported by substantial evidence in the record, the Court should enforce the Board's Order in full and deny the Company's cross-petition for review.

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November 2009

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

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Petitioner

*

* No. 09-72387

and

v.

Board No.

CARPENTERS' UNION LOCAL 180, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

20-CA-33534

Intervenor

*

111101 10110

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HEARN CONSTRUCTION

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Respondent

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its brief contains 5,777 words in proportionally spaced, 14-point Times New Roman type, and that the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC this 25th day of November, 2009

9th Circuit Case Number(s)	09-72387
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